2664

United States Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Plaintiff in Error.

vs.

SARAH J. IRVING,

Defendant in Error,

BRIEF OF APPELLANT.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Appellant.

INLAND PRINTING COMPANY, SPOKANE, WASH.

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STATEMENT OF FACTS.

(References are to printed record.)

This is an action for damages for personal injury. Appellee, Defendant in Error, was a passenger upon one of the regular passenger trains operated by appellant, Plaintiff in Error, between Chicago and Seattle, and as the train was leaving the City of Chicago, and while running between Western Avenue and Pacific Junction, in said city, the engine and forward portion of the train were derailed. The tourist sleeper, in which Appellee was riding, was partly derailed, but remained upright on the rails and road-bed, the engine and cars forward of the tourist being thrown upon their sides and wrecked. Appellee was in the dressing room at the time, and was thrown against the door. The fact of the injury, which fortunately is not very serious, is not disputed. The jury fixed the amount of damages at $1500.00.

The Railway Company answers, and, we think proves, that it was in no way responsible for the derailment of its train, but that the same was caused by the removal of spikes and angle bars and the displacement of a rail at the point of derailment, and that same was the work of trespassing vandals, who thus designed the wrecking of the train.

The train left the Union Depot at 10:15 P. M., and was derailed about twelve minutes later. (p. 56). Between five o'clock that evening and the time of the accident, or in five hours and fifteen minutes, twenty-

three trains, sixteen of which, including this one, were passenger trains; two were work trains and four were freight trains, passed over this track. (pp. 55-56). The last train over the track was the fast mail, which preceded this train by twenty minutes, leaving the Union Depot at 9:55 P. M. (p. 55). Three passenger trains had preceded this one within fifty minutes. (p. 55). Nothing unusual is noted until the happening of the accident. The track is elevated upon an earth embankment between streets, and upon steel bridges over the streets. The railroad is, however, accessible from the streets. (p. 37). There are four parallel tracks, all being constructed upon a slight curve. There were no section crews or other track men of the Railway Company working upon any portion of the track in question after five-thirty o'clock P. M., on the day in question. (pp. 40 & 75). During the day of the accident, and until 5:30 o'clock P. M., a section crew, consisting of Foreman Hegger, who testified as a witness, (pp. 31 to 43), and three other men were engaged in inspecting and working upon the section of track from Western Avenue to Pacific Junction, a distance of about one and one-half miles. (p. 31 & p. 75, Hegger here appearing by mistake in printing as "Heyer"). Hegger had inspected this track on the day of the accident and found all rails properly spiked, there being spikes on each side of the rail, with four spikes to the tie. (pp. 33 and 63). All angle irons were firmly bolted to the rails, and the track in proper condition in all respects. (pp. 33, 41 and 63). The road was in all particulars of

standard construction. There is no evidence of any defect existing for more than a few minutes, at best, prior to the accident.

The engine was of standard type and quality, and by inspection made just before leaving the Union Depot, was found in perfect condition. (p. 97). The train operated at its usual and proper speed, gave no evidence of anything unusual or wrong until the engine suddenly left the rails and turned upon its side. (pp. 97-98).

After the accident the conditions found to exist are described by several witnesses, none of whom are impeached or in any way discredited, and these conditions seem to clearly prove that the cause of the derailment was the intentional displacement of a portion of a rail, and that this was the act of some vandal intent upon wrecking the train. The bolts which held the angle bars firmly upon the rails and thus held the ends of two rails together and in line, were removed and were found near the spot, with every indication that the lock nuts used in holding them in place had been removed by the use of a track wrench. (pp. 45, 46, 54, 74, 92, 93 and 95). The bolts and nuts are in evidence as Exhibit No. 4. They show no evidence of having been removed by other means than the ordinary use of a wrench. A wrench such as is used for the purpose was found near the scene. (pp. 45 and 93). Exhibit No. 3. The spikes for a distance of half a rail length, about sixteen feet, or eight or nine ties, two spikes to the tie, on the inner side of the rail had

been pulled out and were found alongside of the rail. The spikes were uninjured, and had every appearance of having been pulled with a claw-bar, the instrument ordinarily used for that purpose. (pp. 45, 68, 54, 58, 74 and 86). A claw-bar was found near by. (p. 45) Exhibit No. 3. The spikes on the other or outer side of the next rail south had been pulled out for a distance of five or six ties, in an evident attempt to displace that rail also, but one spike was encountered that had been so deeply driven that the claw-bar could not be made to pull it, and so the attempt here was evidently abandoned. (p. 69).

One of the angle bars was broken, and one piece (Exhibit No. 7), was found between the ends of the rails, it having apparently been placed there to hold the displaced rail in its position. (pp. 50, 54, 70, 71, 84, 86, 87, 92).

The rail was pushed inward about one-half the width of the ball or top of the rail, about one and one-half inches, and being held there by the angle bar, was in position to receive the flange of the wheels of the engine. A dent in the end of the rail shows that the flange did strike the end of the rail. (Exhibit No. 6) (pp. 45, 50, 54, 86, 87). A crow bar (Exhibit No. 5), and a small wrench were also found in the weeds near the place the next morning.

The bond wires, used to carry the electric current that operates the block signals, and which are soldered onto the rails at each joint, were not broken or removed. Had this been done the block signals would

have been automatically set against the train and the train would have been stopped before entering the block. (pp. 59, 64, 65, 77).

There is no evidence of any other cause of the derailment than that furnished by these facts, and in the opinion of expert railroad men, the derailment was caused by the misplaced rail, the flange of the engine wheel striking the end of the rail and causing the engine to be immediately derailed. (pp. 45, 54, 70, 71, 72, 73).

SPECIFICATIONS OF ERROR.

I.

The trial Court erred in denying appellant's motion for a directed verdict in favor of the appellant, at the close of all of the evidence in the case, for the reason that the evidence was insufficient to support any verdict, and that there was no evidence of negligence of the appellant whatsoever.

II.

The trial Court erred in instructing the jury as follows:

"In other words, gentlemen of the jury, taking into consideration all of the testimony introduced before you, and presumptions of fact to which I have referred, if you can say that you are satisfied from a preponderance of the testimony here, that the defendant company was negligent, plaintiff is entitled to recover, but if the jury is not satisfied of that fact by a preponderance of the testimony, your verdict must be for the defendant."

III.

The Court erred in entering judgment upon the verdict in favor of appellee and against the appellant, for the reason that the evidence is insufficient to support the verdict, and that there is no evidence at all of negligence of the appellant.

IV.

The Court erred in denying the motion made by appellant for a new trial.

ARGUMENT AND AUTHORITIES.

Apellant contends that there is no evidence in the record sustaining the verdict of the jury, that it was the duty of the trial Court to have directed a verdict for the defendant.

We are well aware that this is a case wherein the doctrine of *res ipsa loquitur* applies; but the presumption which arises from the mere fact of the accident resulting in personal injury, is not evidence; it is but a rule of law fixing the order of proof. The plaintiff in such case is said to have the legal right, because of this rule of law, to compel the defendant to assume the burden of explaining the cause of the accident. The burden of proof does not shift from the plaintiff to the defendant, but the duty of going forward in producing evidence material to the case is placed, in the first instance, upon the defendant. The appellee, plaintiff below, offered no proof of negligence of defendant, whatever, but relied solely

upon the bare presumption. This was sufficient to compel the defendant to proceed to account for and explain the cause of the derailment of the train. The defendant did, we contend, establish, not only by a preponderance of the evidence, but beyond any reasonable doubt, that the derailment was caused by some unknown vandal, and that it was not caused by any agency under the control of defendant; that no reasonable degree of care or diligence could have prevented the accident. Not a scintilla of evidence was offered even tending to disprove any item of appellant's evidence as to the physical facts found to exist immediately after the derailment of the train. These facts must stand as admitted, and being admitted, there is no other conclusion reasonably possible than the one contended for by the appellant.

These facts are, that the railway track in question was of standard construction; that it was inspected during the day of the derailment and found to be in proper condition; that it was used safely by many trains immediately before the time of the derailment; that the engine and cars of the derailed train were inspected a few minutes before leaving the Union Depot on this trip, and found to be in proper condition; that the train was properly operated; and that nothing indicating any defect in the train or in the track was observed before the moment of the derailment. These facts thoroughly disprove the presumption upon which the plaintiff relies.

But the appellant went further and established by

undisputed evidence further facts as follows:—Immediately following the wrecking of the train there was found to exist ample evidence of the fact that a rail had been displaced by being loosened from the ties, and one end of the rail pushed inward about one and one-half inches; that this was accomplished by pulling the spikes that held the rail in place, and by removing the angle bars which joined the ends of two rails; that the person or persons who did this dastardly deed, used the ordinary tools and methods designed for the purpose, such tools being found near the place, and the spikes, bolts and anglebars being also found, all in such condition as to indicate no other fact than that all had been removed by human agency, using the usual tools and methods in removing them; that such condition of the track did not exist twenty minutes earlier, as at that time the fast mail train passed safely over the track.

Had the appellant been able to have produced witnesses to testify that they saw one or more men upon the track within the twenty minutes which elapsed between the passing of the fast mail train and the coming of this train, and to have further testified to having seen the end of the receiving rail pushed in and held in place by the angle-bar inserted between the ends of the rails, that they saw the spikes being pulled and the angle-bars being removed, and that they had heard the vandals say that care must be exercised to avoid breaking the electric circuit, consisting of rails and bonding wires, as to do so would set the signals against the train, and thwart their diabol-

ical scheme, the facts as to what caused the derailment would not, in our judgment, be more completely established. There would then be further evidence of the means of creating the conditions, and evidence of the facts having been seen to exist before the accident, but not more positive evidence that the facts did exist at the time of the accident, and that the appellant was in no way responsible for either the existence of the conditions or for not having discovered their existence.

Had witnesses testified to having seen and heard all we have indicated above, can it be said that there was any question of fact for the jury? Certainly there was not. How, then, can it be said that there was any question of fact for the jury under the facts shown by the record? There is nothing upon the one hand but the bare presumption, while upon the other hand there are facts which fully account for all that happened. To say that the Court is justified in submitting the case to the jury is to say that no state of facts shown by the defendant is legally sufficient to overcome the presumption. In other words, that the bare presumption, unsupported by evidence of any kind, is *evidence* and that the Court may not say as a matter of law that the plaintiff has not sustained the burden of proof necessary to support a judgment in favor of the plaintiff; that every case involving the doctrine of *res ipsa loquitur* must be submitted to the jury, and if the jury for any reason sufficient unto itself, sees fit to disregard the positive and undisputed evidence as to the cause of the accident, and having

thus disregarded the proven facts, find a verdict based upon a presumption, which is designed only to support the rule as to the production of evidence, the Court is powerless to prevent the miscarriage of justice thus effected.

This cannot be the correct rule and no amount of dicta, contained in opinions of courts passing upon the usual complicated facts of cases involving the doctrine of *res ipsa loquitur,* can, we believe, be construed into authority for such decision in this case.

The office of such presumption as the one here involved has been the subject of much consideration. Judge Chadwick, of the Washington Supreme Court, says, speaking for that Court, in a recently decided case:

"Presumptions are indulged when certain proof is wanting; they are never allowed to displace facts.

" 'Presumption,' as happily stated by a scholarly counselor *ore tenus,* in another case, 'may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.' That presumptions have no place in the presence of actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases, of which samples are, Reno v. Railroad, 180 Mo. l. c. 483; Nixon v. Railroad, 141 Mo., l. c. 439; Bragg v. Railroad, 192 Mo. 331. To give place to presumptions on the facts of this case, is but to play with shadows and reject substance." "Paul v. United Rys. Co., 152 Mo. App., 577, 134 S. W. 3."

Beeman v. Puget Sound Traction L. & P. Co., 79 Wash., 137.

And again, in an earlier case:

"A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence. Scarpelli v. Washington Water Power Co., 63 Wash., 18, 114 Pac., 870; Elliott, Evidence, Sec. 91, 92, 93; Wigmore, Evidence, Sec. 2491; Peters v. Lohr, 24 S. D. 605, 124 N. W. 853."

Nicholson v. Neary, 77 Wash., 295-298.

And again, Judge Chadwick, in further discussion of the subject, and in a case decided December 8, 1915, says:

"A great deal has been said about the burden of proof, but a primary rule in all cases is that the one who has the affirmative of an issue must sustain it by competent proof. If that burden is sustained, either by fact or presumption of law, it is incumbent upon the defendant to balance the weight of evidence. If he does there can be no recovery, for the plaintiff has not sustained his case by a preponderance of the evidence. There is a difference between what we call a preponderance of the evidence and the burden of proof. The one is the weight of evidence, the other is a rule of practice fixing the order of proof.

"Mr. Thayer, in his comprehensive work, A Preliminary Treatise on Evidence at the Common Law, finds the expression of Lord Justice Bowen, in Abrath v. North-Eastern R. Co., 32 W. R. 53, to be a clear statement of the true rule. It follows:

" 'In order to make my opinion clear, I should like to say shortly how I understand the term 'burden of proof.' In every lawsuit somebody must go on with it; the plaintiff is the first to begin, and if he does nothing he fails. If he makes a prima facie case, and

nothing is done by the other side to answer it, the defendant fails. The test, therefore, as to burden of proof is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular point of the case, because it is obvious that during the controversy in the litigation, there are points at which the *onus* of proof shifts, and at which the tribunal must say, if the case is stopped there, that it must be decided in a particular way. Such being the test, it is not a burden which rests forever on the person on whom it is first cast, but as soon as he, in his turn, finds evidence which, prima facie, rebuts the evidence against which he is contending, the burden shifts until again there is evidence which satisfies the demand. Now, that being so, the question as to *onus* of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win.'

"See, also, 2 Chamberlayne, Modern Law of Evidence, Sec. 936.

"This rule is adopted, but is not credited as a quotation, by Jones in his work on evidence."

Welch v. Creech, 46 Wash. Dec., 243.

The Nebraska Supreme Court, in a street railway case, says:

"Negligence is the gist of the action, and the plaintiff holds the affirmative, which he must establish by a preponderance of the evidence. Proof of the accident is not direct proof of negligence. The accident is a mere collateral fact, but one so commonly associated with lack of due care that, when proved, it raises a strong probability, amounting to presumption, of negligence. But when proof of such accident is met by proof of other facts and circumstances, making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill and foresight could have

guarded against or prevented, one probability offsets the other, and the affirmative of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not proved. As was said by Commissioner Ames, in Rupp v. Sarpy County (Neb.), 98 N. W., 1042: 'The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end.''

Omaha Street R. Co. v. Boesen, 105 N. W. Rep., 303, 4 L. R. A. (N. S.), p. 122.

See also note to this case.

The circumstances of some cases are such that the Court may properly submit the cause to the jury under proper instructions. Upon the other hand, the facts may be such that there is no controversy in the evidence, and in such case the Court must direct a verdict.

" 'Cases may arise in which plaintiff's *prima facie* case is so fully explained and controverted as to leave no substantial conflict in the testimony.' In such cases it is the duty of the Court to take the case away from the jury, either upon a challenge to the sufficiency of the testimony, or on a motion for a judgment notwithstanding the verdict." * * * "The appellants having shown no cause for the falling of the wire, the only evidence before the Court as to the cause was that given by the defendant. So that upon the charge of negligence there was at the close of the case, no controversy in the evidence; and the question thereupon became one of law for the Court, and not one of fact for the jury. Had appellants in any manner controverted this evidence, by a showing that it did not

occur as contended by respondent, or, occurring, did not cause the Arthur street wire to fall from its post as shown by respondent, then there would have been left a determinable question of fact for the jury; but until there was some issue made as to this evidence there was nothing to submit to the jury."

Scarpelli v. Washington W. P. Co., 63 Wash., 19 (Supra).

The above was a case involving the doctrine of *res ipsa loquitur,* and the appellant insisted that the presumption was sufficient to take the case to the jury. The Court disposes of this contention in the language quoted.

Railway fire cases present a like presumption of negligence which sometimes is raised by the terms of a statute, and sometimes by rules established by Courts.

Judge Sanborn, speaking for the Circuit Court of Appeals, of the Eighth Circuit, says of such a presumption:

"This presumption, however, is not a conclusion of law. It is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof. When that result has been attained, the presumption becomes *functus officio.* It may not be used after the evidence of the facts has been adduced to raise an issue for the jury which the evidence itself does not present. Hence, in the first instance, it is always a question of fact for the Court at the close of the evidence whether or not the presumption of negligence arising from these statutes has been overcome by the evidence of the care exercised by the defendant. If the proper employes of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the engine was op-

erated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption has been overcome as a matter of law, and it is the duty of the court to instruct the jury in a fire case from these states, as in other cases, to return a verdict for the railway company. Rosen v. Chicago G. W. Ry. Co., 27 C. C. A. 534, 536, 83 Fed. 300, 302; Karsen v. Railroad Co., 29 Minn., 12, 14, 15, 11 N. W. 122; Daly v. Railway Co., 43 Minn. 319, 45 N. W. 611; Smith v. Railroad Co., 3 N. D., 17, 23, 53 N. W. 173; McTavish v. Great Northern Ry. Co. (N. D.) 79 N. W. 443, 446; Spaulding v. Railroad Co., 30 Wis. 110, 123, 11 Am. Rep. 550; Id., 33 Wis. 582; Huber v. Railway Co., 6 Dak. 392; 43 N. W. 819; Koontz v. Navigation Co. (Ore.), 23 Pac. 820; Railroad Co. v. Talbot, 78 Ky. 621; Railroad Co. v. Packwood, 7 Am. & Eng. Ry. Cas. 584; Louisville & N. R. Co. v. Reese, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66."

Woodward v. Chicago, M. & St. P. Ry. Co., 145 Fed., 577.

Prior to the filing of the opinion in the Woodward case, Judge Sanborn had filed a strong dissenting opinion in the case of Great Northern Ry. Co. v. Coats, 115 Fed. 452, (opinion on page 458), in which he says:

"There was evidence from which the jury might properly infer that the fire was set by sparks or coals from the locomotive. It is a general rule of evidence, which has been adopted by this Court and by the Supreme Court of South Dakota,—the state in which this case was tried,—that the scattering of coals or sparks of fire by a locomotive raises a presumption that there was either a defect in the engine, or negligence in its operation. Kelsey v. Railroad Co., (S. D.), 45 N. W., 204, 207. But this is not a conclusive

presumption of law. It is only a disputable legal or artificial presumption of fact which has been adopted by the courts, *ab inconvenienti,* for the purpose of changing the burden of proof, because it was so difficult for the plaintiffs to establish in the first instance defects in the locomotives, or negligence in the operation of the engines of railway companies. In Smith v. Railroad Co., 3 N. D. 17, 22, 53 N. W. 173, the Supreme Court of the state announced the real reason and the true legal effect of this rule in these words:

" 'But to prevent a denial of justice some of the courts have created an artificial presumption of negligence, to the end that the defendant may be compelled to produce the witnesses who are familiar with the facts on which the issue of negligence depends, that they may be subjected to full and searching cross-examination on all the phases of the case,—on all the possible grounds of negligence. Some courts have refused to go so far. To extend this presumption of negligence beyond the reason for its existence would be irrational. It summons defendant to show that there was no negligence, and the evidence must fully meet every possible ground of negligence under the circumstances and the pleadings. But when the whole case, independently of this artificial presumption, shows that there was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury. It has fully served its purpose, and can have no other effect. We therefore establish it as the rule in this case that the Court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overthrown.' "

"The rule that the scattering of fire raises a presumption of defect in the engine, or negligence in its operation, was subsequently enacted into a statute in the state of North Dakota. Rev. Codes N. D., Sec. 2984. But even when embodied in that imperative form the Supreme Court of that state adhered to its rule. It said:

" 'Setting the fire is made presumptive evidence of such defects or negligence. But this Court is fully committed to the principle that whether or not such statutory presumption is overcome by evidence introduced by the defendant is, in the first instance, a question of law for the Court (Smith v. Railroad Co., 3 N. D. 17, 53 N. W. 173), and also to the further position that when the proper employes of the defendant railroad company have gone upon the stand, and testified that there were no defects in the construction or equipment of the engine, and no negligence in its operation, making their testimony at all points as broad as the presumption, then, as *matter of law,* such presumption is overcome. Evidence of that character was introduced by the defendant in this case.' McTavish v. Railway Co., 79 N. W. 443, 446.

"The same rule prevails in the state of Minnesota, under a similar statute. Thus, while in the Karsen Case, cited in the opinion of the majority, the Supreme Court of Minnesota held that the evidence for the defendant in that particular case had not satisfactorily overcome the presumption, it as clearly declared that it was a question of law for the Court whether or not the evidence had done so, and that whenever it had that effect there was no question left for the jury, and it was the duty of the Court to withdraw the issue from their consideration. That Court said:

" 'We do not think or hold that the mere fact that the fire was set by an engine has such an effect as direct evidence of negligence, if the otherwise uncontradicted evidence on the part of the Railroad Company showed satisfactorily that it had fully performed its duty in the premises. And if a jury should so find, it would be the right and duty of the Court to set aside the verdict, as in any other case where it was not justified by the evidence;' Karsen v. Railway Co., 29 Minn., 14, 15; 11 N. W., 122.

"To the same effect are Spaulding v. Railroad Co., 30 Wis., 110, 123; 11 A. Rep., 550; Id. 33 Wis., 582; Huber v. Railway Co., 6 Dak., 392; 43 N. W., 819; Koontz v. Navigation Co. (Or.), 23 Pac., 820; Railroad Co. v. Talbot, 78 Ky., 621; Railroad Co. v. Rackwood, 7 Am. & Eng. R. Cas., 584; Railroad Co. v. Reese, 85 Ala., 497; 5 South, 283; 7 Am. St. Rep., 66.

"Nor is this rule variant from that which ordinarily obtains when *uncontradicted evidence meets a disputable presumption of fact.* Lawson, in his Law of Presumptive Evidence, at page 661, says:

" 'Primarily, the rebuttable legal presumption affects only the burden of proof; but, if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption.'

"In Bryant v. Railroad Co., 4 C. C. A., 146; 53 Fed., 997,—an action for negligence resulting in death,—it appeared at the first trial that the deceased was riding on a passenger car of the defendant on its railroad when he was killed, and there was no rebutting testimony. This Court held that the fact that he was riding on the passenger car upon the railroad raised a presumption that he was a passenger, and reversed the Court below because it directed a verdict for the defendant. The same fact was proved at the second trial, and the same presumption arose, but it was then rebutted by uncontradicted evidence that a yardmaster who was without authority to do so was operating the passenger car without the knowledge of the Railroad Company when the deceased was killed. At this second trial the Court below had submitted the case to the jury, and the Railroad Company was met in this Court by the proposition that, since the presumption had once arisen in the case that the deceased was a passenger, it remained and

constituted some evidence for the consideration of the jury, and therefore prohibited the Court from taking the issue from them. But this Court said:

" 'A presumption of fact, like that which the counsel for the defendant in error herein invoke, is a mere inference from certain evidence, and, as the evidence, changes, the presumption necessarily varies. A trial Court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose. Possession of real estate raises a presumption of title, but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the Court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another, and that the possessor secretly took him from his owner without right, raises so conclusive a presumption of ownership in the latter that the Court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny.'

"And we reversed the judgment below, and held that it was the duty of the trial Court to take the question whether or not the deceased was a passenger from the jury, notwithstanding the fact that the presumption that he was so arose from the plaintiff's evidence. Railroad Co. v. Bryant, 13 C. C. A., 249, 256; 65 Fed., 969, 975, 976. The presumption of negligence in the operation of a locomotive which arises from the fact that it scatters sparks or coals or sets a fire is neither more sacred nor more conclusive than the presumption of ownership which arises from the possession of property, or the presumption of the relation of one riding in a car to a carrier which arises from his riding on its railroad in its passenger car, or from any other disputable presumption of fact; and it ought to receive no different measure of consideration.

"The Supreme Court of the state of South Dakota (the state in which the case at bar arose, and in which it was tried) has adopted the rule which prevails in North Dakota, Minnesota, and many other states,—the rule that it is always, in the first instance, a question of law for the Court whether or not the presumption of defects in a locomotive, or of negligence in its operation, arising from the setting of a fire or the scattering of sparks or coals, is overcome by the testimony of due care introduced by the defendant, and that if the uncontradicted evidence of its proper employes is that there were no defects, or that there was no negligence in the operation of the locomotive, and that testimony is as broad as the presumption, the presumption is overcome, as a matter of law, and it is the duty of the Court to withdraw the issue from the jury. Thus in Kelsey v. Railroad Co., 45 N. W., 204, 207, that Court said:

" 'The plaintiff, by proving that the defendant's locomotive engine had set fire to dry grass or other combustible matter along its roadbed, made a prima facie case of negligence; and, had defendant failed to introduce any proof, the plaintiff would have been entitled to a verdict in his favor, under the direction of the Court. But the defendant did introduce its employes who were engaged in running the train at the time, and the master mechanic having charge of the repairs of the engines of the road for that division, who testified that this particular engine was in good order, and had the modern appliances attached to it to prevent the emission of sparks and the dropping of live coals of fire, and that the engine was run with the usual case and caution at the time the fire started. This evidence rebutted the presumption raised by the plaintiff's proof, and, had there been no other evidence of negligence, the defendant would have been entitled to a verdict from the jury under the direction of the Court.' "

"This rule that the presumption of negligence from the setting of a fire is, as a matter of law, over-

come by the uncontradicted testimony of witnesses that due care was exercised, is a rule of evidence, a rule of practice, a rule which simply measures the force and effect of a disputable presumption of fact in the trial of fire cases in the states of South Dakota, North Dakota, Minnesota, and perhaps in other states; and in those states it ought to and does obtain in the Federal Courts, as well as in the state Courts, because it is a just and rational rule, and because the act of congress provides that the practice, forms, and modes of proceeding in actions at law in the national Courts shall conform, as near as may be, to the practice, forms, and modes of proceeding existing at the time in like causes in the Courts of Record of the state within which the Federal Courts are held. Rev. St., Sec. 914.

"The result is that it was, in the first instance, a question of law for the Court below in this case whether or not the presumption of negligence in the operation of the defendant's locomotive, which arose from the scattering of sparks or coals and the setting of the fire, was overcome by the testimony for the defendant; and if the testimony of its proper employes that there was no negligence in the operation of the engine, was uncontradicted, and was as broad as the presumption, then that presumption was overcome, as a matter of law, and it was the duty of the trial Court to withdraw this charge of negligence from the consideration of the jury on the motion of the defendant."

If the facts themselves do not speak negligence, they cannot be aided by a presumption which is not evidence of a fact. The presumption never goes to the jury as a question of fact. As said in Spaulding vs. Ry. Co., 33 Wisconsin, 582, at page 592:

"The presumption under consideration is clearly one of law. Its weight and effect and the amount and

character of the proof necessary to overcome it, are questions for the Court. * * * The better opinion seems to be that no disputable presumption of law is to be regarded as testimony which must necessarily be submitted to the jury. * * * It is a presumption drawn or indulged by the Court, as distinguished from one which must be drawn by the jury, which furnishes the practical test whether it is a presumption of law or a fact."

In the case of *State v. Hodge,* 50 N. H., 510, the question of whether such a presumption should go to the jury or is for the Court, is learnedly answered according to our contention. The case should be read.

Wigmore, in his work on Evidence, Secs. 2490, 2491 and 2494, defines *prima facie* evidence, or *prima facie case,* to simply mean sufficient evidence or case upon which a party would be entitled to recover if his opponent produced no further testimony.

Elliott on *Evidence,* Vol. 1, Sec. 91, gives the rule more comprehensively and in a practical way, thus:

"The office or effect of a true presumption is to cast upon the party against whom it works the duty of going forward with evidence. It has the force and effect of a *prima facie* case and, temporarily, at least, relieves the party in whose favor it arises from going forward with the evidence. This would seem to be its sole office and effect, considered merely in its character as a presumption. If nothing further is adduced, it may settle the case in favor of the party for whom it works, and, on the other hand, when the other party has gone forward with his evidence, and the *prima facie* case is overcome, *the force of the presumption is spent.*"

Sec. 92. "The evidential facts upon which the presumption is based, or from which it springs, may take their place with the rest and operate with their own natural force as a part of the entire mass of evidence or probative matter, and thus be put into the scale and weighed with the rest, *but the presumption itself cannot be.* To permit a presumption to be added to the scale when the facts upon which it is based are shown, *would be to give double weight to the same facts.*

In *Gibson vs. International Trust Co.,* 177 Mass., 100; 58 N. E., 278, it is directly ruled in a negligence case, that "the plaintiff seeks to avail himself of the doctrine of *res ipsa loquitur,* but we are of the opinion that that doctrine has no application where all the facts and circumstances appear in evidence."

The case was one where the plaintiff was injured by an elevator starting prematurely by the involuntary act of the elevator boy in attempting to save himself from falling as he attempted to sit down on a movable chair which had been taken away without his knowledge. No other facts were shown by the plaintiff, and it was insisted that the presumption obtaining from *res ipsa loquitur* should be applied and weighed as evidence in the case. The Court ruled as above that the facts of themselves must speak negligence and no weight can be given to the presumption when all the facts are before the Court.

The Wisconsin case of Menominee Sash Door Co. v. Ry., 91 Wis., 447, cited in support of the foregoing text, ably points out when the presumption acts in a

given case and when it is a nullity. And, quoting further from authorities, it is said:

"The presumption, when the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then in whose favor the presumption operated, must meet his opponent's *prima facie* evidence *with evidence* and *not presumptions.* A presumption is not evidence of a fact, but purely a conclusion."

The most practical and sensible analysis of the proposition that presumptions are not evidence, is made by *Hammon* on *Presumptions, Burden of Proof and Judicial Admissions,* a work published in the year 1907 in one volume. His elucidation of the subject is so clear, as compared with most text writers, that the one volume work ought to be on the desk of every trial and Appellate Court. His text is always supported by the ablest Courts of the Union. In speaking to the point, he says (p. 47):

"While presumptions are ordinarily regarded as belonging peculiarly to the law of evidence, they belong in strict propriety to the wider field of legal reasoning in its application to particular subjects. They are 'aids to reasoning and argumentation and assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted,—by assuming its existence.' *In themselves, however, they are not evidence, although for the time being they accomplish the result of evidence. They are simply a process which aids and shortens inquiry and argument.*"

He cites, in support of the statement that presumptions in themselves are not evidence, the following cases:

Sturdevant's Appeal, 71 Conn., 398;
McGinnis v. Kempsey, 27 Mich., 363;
Lisbon v. Lyman, 49 N. H., 553.

Again, the author, Sec. 66f., p. 276, says:

"And it (presumption of negligence) does not arise if, in proving the accident, additional facts appear which exonerate the defendant from blame."

See also:

Dovell v. Guthrie, 99 Mo., 653;
Stearns v. Co., 184 Penn., 519;
Ry. Co. v. Waxelbaum, 111 Ga., 812.

The rule obtains in a variety of cases. It perhaps has been applied and construed more often in negligence cases than in others. However, in the case of bailments the rule has been uniformly applied with as much precision and consistency as in the negligence cases heretofore cited.

The New York Supreme Court, since the case of *Platt vs. Hibbard,* 7 Cowan, 500, and down to the present time of *Stewart v. Stone,* 127 N. Y., 500, has adhered to the rule that presumptions are merely rules of law and can aid nothing where all the facts appear or should appear. In the Platt case it is said:

"The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must, *in all cases* suing him for the loss of goods, allege negli-

gence and prove negligence. The burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, *these facts unexplained are treated by the Courts as prima facie evidence of negligence; but, if, either in the course of his proof or that of the defendant,* it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman."

Where the presumption arising from the fact of the accident is met by evidence making it equally probable that the accident was not due to negligence on the part of the defendant, the latter will be entitled to a verdict in the absence of other evidnce tending to establish the affirmative of the issue.

Vol. 5, Ruling Case Law, Sec. 719, p. 85;
Omaha St. Ry. Co. v. Boeson, 74 Neb., 764; 4 L. R. A. (NS.), 122;
Mexican Central Ry. Co. v. Lauricella, 87 Tex., 277; 47 Am. St. Repts., 103, and note.

A very instructive case, and one very similar to this case, is that of *Fredericks v. North Central Ry. Co.,* 157 Pa., 103; 22 L. R. A., 306. In that case, cars left upon a side track with brakes set and the derailing switch open were released and directed onto the main line by boys, and a collision occurred with a train carrying passengers. On the authority of the case of Deyo v. N. Y. Central Ry. Co., 34 N. Y., 9, and other cases, the Pennsylvania Court held that there was no liability.

"The rule of highest skill, care, and prudence does

not require the impossible, or the very extreme of care and precaution that can be imagined. In Shearman & Redfield on Negligence (Sec. 266) it is thus expressed: 'This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenious mind could suggest, or have all the skill that science could give, nor that he must use all the precaution which, after an accident has happened, it can be seen would have sufficed to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur.' Again, at section 270, the writer says: 'A railroad company is certainly not liable for an injury arising from a break in its tracks, caused by a sudden and extraordinary flood, or by the wilful act of a stranger, unless the injury happens to a train which the servants of the company run upon the broken road after they, or those who ought to advise them, have had notice of its condition, or have had sufficient opportunity to learn it.' In 2 Wood's Railway Law, at section 302, the writer, presenting the subject in words nearly identical with the foregoing, continues: 'The law does not require such particular precaution as, it is apparent after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur. The defendant must use the highest degree of practicable care and diligence that is consistent with the mode of transportation adopted.' This was the precise language of the Court in the case of Bowen v. New York Cent. R. Co., 18 N. Y., 408; 72 Am. Dec., 529. The rule is stated in substantially the same way in 2 Rorer on Railroads (p. 955), thus: 'But this rule of greatest possible care is not to be understood as requiring the utmost degree of care which the human mind can attain to or is capable of inventing. Such application of it would involve such an expenditure as would tend to prevent all persons of ordinary prudence from engag-

ing in the business. It simply means greatest degree of care that is consistent with that mode of transportation. It does not contemplate such a measure of care as will render it practically impossible to continue the railroad transportation of passengers. * * * They are by no means insurers of human life, and are not accountable for the results of latent defects which the usual and well-recognized tests of science and art fail to detect; nor are they liable for accidents which skill and experience are unable to foresee and avoid.'

"The very question which arises in this case was decided in Deyo v. New York Cent. R. Co., 34 N. Y., 9. The plaintiff was a passenger on the railroad of the defendant at night. 'The train was thrown from the track through the culpable act of some unknown person, who maliciously or mischievously drew the spikes which fastened the chairs and the rails. Two trains had passed over this section of the road at the point where the injury happened. * * * The road was in good condition when these trains passed over it in safety and without any obstruction.' Davies, J., in delivering the opinion, said: 'The only question upon this appeal is whether there was any evidence of negligence on the part of the defendants or their servants sufficient to warrant the learned justice who tried the action in submitting that question to the jury. It is a familiar principle that carriers of passengers are not insurers of the safety of their passengers. Their duty is measured by the dangers which attend railroad carriage; and the utmost foresight as to possible dangers, and the utmost prudence in guarding against them are required to exempt them from liability in case of injury to a passenger. * * * There was no evidence in this action of any negligence on the part of the defendants, their servants or agents. This portion of the track was laid with the best and most improved rail. It was in perfect order. It had been passed over by their track-master a few hours before the accident. Within two hours before it occurred three trains of cars

had passed over it in safety, and it must then have been in complete order. The proximate cause of the accident was the removal of the spikes which fastened the chairs and rails to the ties and sleepers. It is apparent that, as soon as these fastenings were removed, a superincumbent pressure would displace the rails, and thus inevitably throw the cars off the track. No human care or foresight could guard against such a diabolical act, committed under the circumstances developed in this case. It is clear that these fastenings must have been removed after the last train going east had passed the point where the road was disturbed.' The Court below had on the trial granted a compulsory nonsuit, and the Court of Appeals affirmed the judgment, saying: 'If, therefore, the jury on this testimony had found that the defendant had been guilty of negligence, it would have been the duty of the Court to have set aside the verdict.'

"It will be observed that in the case just cited there was no affirmative proof as to who removed the spikes, and thus caused the rails to become displaced. There was, therefore, a possibility that they might have been removed by some vindictive employe who had been discharged. In fact, there was evidence to prove just such a state of facts, but nevertheless the Court held that the company was not liable. But in the case at bar there was full proof that the cars were uncoupled and the brakes loosened, and the switch turned back, by a person who was a total stranger, and having nothing to do with the defendant company, and for whose acts, therefore, the company was not responsible in any conceivable manner.

"The case of Curtis v. Rochester & S. R. Co., 18 N. Y., 534; 75 Am. Dec., 258, is another instance in which the same doctrine of non-liability was held, although there the evidence was sufficient to warrant a verdict of negligence. The plaintiff was a passenger, and was injured by the car running off the track at a switch at a station, which was misplaced, on the main track. There was no evidence to show how it

become misplaced, and as it was at a station there was sufficient evidence of want of care to carry the case to the jury. But the Court of Appeals, in their comments upon the rule of duty applicable in such cases, said: 'Carriers of passengers are not insurers, and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of passengers, and are responsible for the slightest negligence. But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them. * * * Still accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them.'

"That is precisely this case. These cars were in a place of safety, and amply secured against either leaving their position or running on the main track, by a switch, so as to derail them if they did get loose. But they were detached from the other cars, their brakes were opened, and the derailing switch turned back by one who was a stranger; and within a very few minutes after this was done the collision occurred. There was no time for the defendant's agents to discover the mischief, and they cannot be charged with negligence in that respect. So far as this defendant is concerned, it is of no consequence who it was that committed this crime, nor what his motives were. He was a stranger, over whom they had no control, and they were not responsible for his acts.

"In two of our recent cases the rule of the presumption of negligence from the mere fact that the plaintiff was a passenger, and was injured, has received qualifications which are strictly applicable to the case at bar. The first of them is Pennsylvania R. Co. v. McKinney, 124 Pa., 462; 2 L. R. A., 820, in

which the plaintiff was a passenger on the defendant's train, and while reading a newspaper in his seat at an open window, was struck in the eye by a hard substance, and seriously injured. On the trial the Court below instructed the jury that they should start with the presumption that the defendant was guilty of negligence from the mere happening of the accident, and that it thereupon devolved upon the defendant to rebut that presumption, and show that they were not negligent. We held that this was error, because the accident occurred from something extraneous to the railroad and the appliances of travel, and it would be necessary for the plaintiff to go further, and affirmatively prove that there was negligence. The present chief justice, in delivering the opinion, pointed out the difference between an accident resulting from the mere operation of the road and one which was the result of some extrinsic cause. In the former the presumption of negligence arose, from the mere happening of the accident; in the latter no such presumption arose, and the fact of negligence for which the defendant was responsible must be proved by satisfactory testimony, just as in any ordinary case between strangers. Concluding, he said: 'If the case had been submitted to the jury on the evidence, and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employes had anything whatever to do, that would have raised prima facie a presumption of negligence on the part of the company, and thrown upon it the burden of proving that it did not exist.'

"In the present case, the injury having occurred as the result of a collision of cars on the railroad, the plaintiff was entitled to the benefit of a presumption of negligence, and the Court below so charged the jury. But the defendant met and rebutted that presumption by showing conclusively, and without the least contradiction, that the collision was occasioned

solely by the criminal act of a stranger, with whom neither the company nor its agents had anything to do. As this was an undisputed fact, it is almost impossible to understand why the learned Court below would not have been justified in withdrawing the case from the jury, as was done in the case of Deyo v. New York Cent. R. Co., supra, on the ground that upon the whole testimony no negligence was shown for which the defendant was responsible. But the learned Court left that question to the jury, and the jury found that the defendant was not guilty of any negligence which produced the injury, and that verdict, of course, settles the question.

"The appellant claims that the Court below did not dwell with sufficient force and emphasis upon the rule of the highest degree of care, skill and prudence which was humanly possible. It is sufficient to say in reply that, in view of the entirely uncontradicted testimony in this case, it was only necessary to inquire whether the defendant had rebutted the presumption of negligence which arose from the mere facts of the injury. There was nothing in the case but the mere presumption. All of the actual testimony as to the real facts of the occurrence tended in a most eminent degree to show that there was no negligence for which the company was responsible, and that the injury was the result of the willful criminal trespass of a stranger. In such circumstances the highest inquiry that could legitimately be conducted by the jury was whether there was any negligence on the part of the defendant in the precautions taken against such an accident. That question was fully submitted by the learned Court to the jury, with instructions to find for the plaintiff if they found such negligence. The appellant's points on the subject of the highest possible degree of care were affirmed, and the remark of the Court below that the principle was very strongly expressed, was entirely correct in view of the manifest facts of the case. So, also, his expression of individual opinion that the precautions taken by the defendant were suf-

ficient to relieve them of the charge of negligence was appropriate and just in view of the testimony. He distinctly told the jury it was for them to decide the question, and left them entirely free to act upon their own judgment. In the case of Latch v. Rumner R. Co., 3 Hurlst. & N., 930, the plaintiff's trucks were derailed by the misplacement of the points of a siding. There the evidence showed that shortly before the accident a stone was found inserted under the lever of one of the points, and the defendant claimed that this had caused the accident, and, as it was the willful act of a stranger, they were not responsible. The judge who tried the case thought there was no evidence of actual negligence, and told the jury that if the defendant's account was correct they were entitled to a verdict, unless the jury thought there was negligence in not having a person to take care of the points, and he said he did not think there was. A verdict was rendered for the plaintiff, and on a rule for a new trial the case was heard en banc, and the rule made absolute. The Court said: 'There was evidence that there had been a willful act on the part of a stranger which would have caused the accident, and no evidence of negligence on the part of the defendants. None was suggested, except their not having a person always at the spot to look after the "points", which they were not bound to have. The siding had been in that state for months, and no accident had happened. The verdict was clearly contrary to the evidence, and there must be a new trial.' In this case there was no proof as to who had placed the stone under the lever, and the verdict had found negligence as a fact, but the Court set it aside as unwarranted by the testimony. Our own very recent case of Thomas v. Philadelphia & R. R. Co., 148 Pa., 180; 15 L. R. A., 416, affords a still more striking illustration of the inapplicability of the rule of the highest possible care, in the case of an injured passenger, and of the necessity of affirmative proof of actual negligence, before a recovery could be had. The facts and the conclusions of the Court are well

stated in the opinion of Chief Justice Paxson: 'On June 5, 1890, the appellant was a passenger on the cars of the defendant company, and in the vicinity of Pottstown was struck on the arm by a missile with sufficient force to cause a fracture thereof. It was not shown what caused the injury. The appellant did not see the missile, nor was it found in the car. There was no evidence that any one was near the train on the outside who could have inflicted the injury. This suit was brought to recover damages for the injury referred to. The theory of the appellant was that it was caused by a loose nut, thrown from one of the switches of the defendant's roadbed, over which the train was passing at the time. This was a mere theory, however, without any evidence to sustain it. The appellant contended that under the circumstances the question of the defendant's negligence should have been submitted to the jury. The Court took a contrary view of the case, and directed a verdict for the defendant. This was the error assigned. * * * There was nothing in the evidence to connect the accident with any defect in the cars or machinery, the movement of the train, or in any of the appliances of transportation. There was nothing, therefore, to submit to a jury. It would be as reasonable to hold that a bullet fired into the car from without, by means of which a passenger is killed, is evidence of negligence on the part of the company.' It will be seen that in this case the rule that a presumption of negligence arises in favor of a passenger travelling on a train from the mere fact of the accident was refused application, and the rule that the highest possible care must be applied was denied enforcement, because there must be evidence to justify it in the intrinsic facts of the case. Neither of these rules, therefore, is of universal application, and the particular circumstances must be considered in order to determine how far they control the decision. Here the legal presumption was applied because the injury resulted from a collision of cars. But, the presumption having been fully rebutted by proof that

the collision was the result solely of the criminal act of a stranger, it suffices no further purpose."

See also:

Whipple v. Michigan Cent. Ry. Co., 90 N. W., 287;

Seaboard Air Line v. Thompson, 48 So., 750;

Sweeney v. Erving, 228 U. S., p. 237.

The last case above cited was submitted to a jury and the verdict was for the defendant. The language of the Court in that case will be construed by respondent to mean that every case in which the doctrine of *res ipsa loquitur* applies must be submitted to a jury. The Court, there, however, was construing facts growing out of a burn received by plaintiff when being treated by a physician by use of an X-Ray machine. The facts of the case are in no way analogous with those where the accident, so-called, is such as growing out of the derailment of a train. The Court there says, however:

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

"The doctrine has been so often invoked to sustain the refusal of trial Courts to non-suit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part."

The question being passed upon by the Court was the alleged error of the Court in refusing to give a requested instruction, which is set forth in the opinion. The question was not raised as to whether the case should have been taken from the jury by a preemptory instruction, and doubtless that case was properly submitted to the jury. The portion of the opinion relative to submitting the case to the jury is not necessary to the decision of that case, is mere *obiter dictum,* and cannot be construed, we think, as authority for the position taken by respondent here.

From these somewhat extended quotations and the rules of law therein expressed, applied to the facts of this case, it seems to us to be most evident that the Court erred in all four particulars set forth in the Specifications of Error. There being no disputed question of fact, and no impeachment of any witness,

the Court was bound to direct a verdict for the defendant, as in a case where the evidence is undisputed, or is of such a conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Union Pacific Ry. Co. v. McDonald, 152 U. S., 262; Opinion on p. 284;
Delaware, etc., R. R. v. Converse, 139 U. S., 469, 472, and authorities there cited;
Elliott v. C., M. & St. P. Ry., 150 U. S., 245;
Anderson County Commissioners v. Beal, 113 U. S., 227, 241;
Mt. Adams Etc., v. Lowery, 74 Fed., 463;
Wright v. So. Express Co., 80 Fed., 85;
U. S. v. Meldrum, 146 Fed., 390;
Morse v. St. Paul, etc., Ins. Co., 129 Fed., 233, at 236.

In no event should the Court have treated the presumption as having the same effect as testimony, or as testimony, as was done in the instruction which is set forth in the second Specification of Error. The authorities are, we think, unanimous, that the presumption is not to be taken as testimony, but only in lieu of evidence in certain cases. The effect of this Instruction was to instruct the jury that there was evidence supporting plaintiff's case.

The motion for a new trial should have been granted upon this ground, if for no other, but it seems

apparent to us that so conclusive is defendant's case that nothing remains to be done but to direct a reversal of the judgment and a dismissal of the case.

Respectfully submitted,

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